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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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| THE STATE OF ARIZONA,<br><br>Appellee,<br><br>v.<br><br>EDUARDO MARTINEZ,<br><br>Appellant. | 2 CA-CR 2010-0070<br>DEPARTMENT A<br><br>MEMORANDUM DECISION<br>Not for Publication<br>Rule 111, Rules of<br>the Supreme Court |

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20072541

Honorable Edgar B. Acuña, Judge

AFFIRMED

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B R A M M E R, Presiding Judge.

**¶1** Eduardo Martinez appeals from his conviction for fraudulent scheme and artifice.[1] He argues the conviction was not supported by sufficient evidence that he "obtained a benefit by means of a false pretense or representation." He also argues the trial court erred in admitting other act evidence and testimony regarding one of his prior convictions. We affirm.

## Factual and Procedural Background

**¶2** On appeal, we view the facts in the light most favorable to sustaining Martinez's conviction and sentence. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). Martinez was indicted on one count of fraudulent scheme and artifice and one count of theft. The charges stemmed from a checking account he had opened by using a fictitious social security number and by funding the account with checks drawn on closed accounts. Martinez opened an account at Arizona State Credit Union on December 27, 2006, initially depositing $270 into the account, including a $250 check drawn on a closed Compass Bank account in his name. The next day, Martinez deposited three additional checks into the credit union account, including a $150 check drawn on the closed Compass account and two checks drawn on his closed Bank of America account for $500 and $1000. Martinez later deposited in his credit union account a $300 check, drawn on the closed Compass account. Although the credit union

[1]We note Martinez also was convicted for theft, but his notice of appeal refers to a single "conviction," and on appeal his arguments address only the conviction for fraudulent scheme and artifice.

gave Martinez credit for those checks, they later were returned after processing, resulting in a monetary loss to the credit union.

**¶3** At trial, the state presented the testimony of a Bank of America personal banker, a bank investigator for Compass Bank, an investigator for Arizona State Credit Union, a representative from Basha's, a teller from Arizona State Credit Union, and the director of Pima County's bad check program. A jury found Martinez guilty of one count of fraudulent scheme and artifice and one count of theft. At the "priors trial," the state again presented the testimony of the director of the bad check program, and the trial court admitted into evidence a certified copy of Martinez's "pen pack" from the Arizona Department of Corrections and certified copies of four prior sentencing documents. The court found Martinez had two prior felony convictions and sentenced him to a presumptive 15.75-year prison term for fraudulent scheme and artifice and a concurrent, presumptive five-year prison term for theft. This appeal followed.

## Discussion

### Insufficient Evidence

**¶4** Martinez asserts his conviction for fraudulent scheme and artifice was not supported by sufficient evidence because he had not obtained a benefit by means of a false pretense or representation, reasoning that "knowingly passing a bad check" does not constitute a "false statement."[2] We review a claim of insufficient evidence de novo, *State*

[2]Martinez relies on the Supreme Court's holding in *Williams v. United States*, 458 U.S. 279, 284 (1982), which addressed a statute that prohibits making false statements to federally insured banks. However, *State v. Williams*, 134 Ariz. 411, 416 n.5, 656 P.2d

*v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993), and we view the facts in the light most favorable to sustaining the verdict, resolving all inferences against the defendant, *State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996). "To set aside a jury verdict for insufficient evidence it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987).

**¶5** Martinez was convicted of fraudulent scheme and artifice under A.R.S. § 13-2310. Section 13-2310(A) provides: "Any person who, pursuant to a scheme or artifice to defraud, knowingly obtains any benefit by means of false or fraudulent pretenses, representations, promises or material omissions is guilty of a class 2 felony." A fraudulent scheme or artifice is "some 'plan, device, or trick' to perpetrate a fraud." *State v. Clough*, 171 Ariz. 217, 222, 829 P.2d 1263, 1268 (App. 1992), *quoting State v. Hass*, 138 Ariz. 413, 423, 675 P.2d 673, 683 (1983). The "false pretense" must be "the *means by which the benefit is obtained*, not the means to avoid detection." *State v. Johnson*, 179 Ariz. 375, 380, 880 P.2d 132, 137 (1994) (emphasis in original). Furthermore, to satisfy § 13-2310, "there need not be an actual misrepresentation or even a material omission," there need only be "a false pretense, including a subterfuge, ruse, trick, or dissimulation upon another." *Id.* at 377, 880 P.2d at 134.

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1272, 1277 n.5 (App. 1982), expressly concluded the Supreme Court's holding was limited to the federal statute at issue and, therefore, it is not controlling here.

**¶6** In *State v. Fimbres*, 222 Ariz. 293, ¶ 7, 213 P.3d 1020, 1024 (App. 2009), this court determined there was sufficient evidence of fraudulent scheme and artifice pursuant to § 13-2310 when the defendant had used illegally altered gift cards.[3] We determined the evidence supported the jury's conclusion Fimbres "obtain[ed] a benefit through misrepresentation or false pretense" by using gift cards that appeared valid to purchase retail merchandise, thus representing that the cards were legitimate. *Id.*

**¶7** The analysis in *Fimbres* applies here. Martinez also knowingly "obtain[ed] a benefit through misrepresentation or false pretense," *see id.*, by using checks that appeared valid to open and fund a checking account but were drawn on accounts of other financial institutions containing insufficient funds to honor them. Therefore, a reasonable jury could find Martinez "obtain[ed] a[] benefit by means of false or fraudulent pretenses, [or] representations." *See* § 13-2310(A); *see also Johnson*, 179 Ariz. at 380, 880 P.2d at 137 (false pretense must be means by which benefit obtained not merely means to avoid detection). Moreover, Martinez's actions caused the credit union victim to rely on those invalid checks when opening the new account for him; the account was opened by depositing the bad checks into the account, resulting in a loss to the credit union when they were dishonored later. *See State v. Proctor*, 196 Ariz. 557, ¶ 16, 2 P.3d 647, 651-52 (App. 1998) (although actual reliance not required under statute, defendant's conduct must be "reasonably calculated to deceive persons of ordinary prudence and comprehension").

[3]We decline Martinez's invitation to "reconsider" the analysis used in *Fimbres*.

**¶8** Furthermore, in addition to evidence Martinez knowingly had presented checks when there were insufficient funds in the accounts upon which they were drawn to cover them, the state also presented evidence Martinez had opened accounts using a false social security number. And when confronted about the checks having been returned to the credit union, Martinez told the credit union his checks had been stolen, later changing his story when the credit union official told him the signature on the checks matched the signature on his application to open the credit union account. Moreover, Martinez did not stop writing checks against the credit union account after being informed that account was overdrawn. These facts are further evidence from which a reasonable jury could conclude Martinez had acted "pursuant to a scheme or artifice to defraud" the credit union and obtained a benefit by means of a false pretense. *See* § 13-2310(A); *see also Clough*, 171 Ariz. at 222, 829 P.2d at 1268 ("knowing presentation of an insufficient funds check *is the scheme or the artifice*") (emphasis in original). Therefore, there was sufficient evidence to support the jury's verdict finding Martinez guilty of fraudulent scheme and artifice.

**Other Acts Evidence**

**¶9** At trial, the court asked the Compass investigator the following question, submitted by a juror: "Did he, assuming they are talking about Mr. Martinez, ever put any money into the [Compass] account?" The investigator testified in response that on July 27, 2006 an initial $60 deposit had been made into the Compass Bank account and the account became overdrawn within a week, never regaining a positive balance until it

was closed on November 3, 2006. Martinez asserts this testimony was inadmissible evidence of other acts because it was not disclosed properly and violated Rule 404(b), Ariz. R. Evid. "We review the [trial] court's decision to admit other acts evidence for [an] abuse of discretion." *State v. Villalobos*, 225 Ariz. 74, ¶ 18, 235 P.3d 227, 233 (2010).

**¶10** Martinez first argues the testimony was inadmissible because Rule 15.1(b)(7), Ariz. R. Crim. P., requires the state to disclose its intent to use other acts evidence before trial. This argument is without merit. Rule 15.1(b)(7) requires the prosecutor to make available to the defendant certain "material and information within the prosecutor's possession or control" before trial, including "[a] list of all prior acts of the defendant which the prosecutor intends to use to prove motive, intent, or knowledge or otherwise use at trial." This testimony was in response to a jury question and, therefore, was not information within the prosecutor's control before trial. Nor does the record suggest the prosecutor had any pre-trial intent to use such testimony.

**¶11** Martinez also argues the testimony was "extremely prejudicial"[4] and was inadmissible under Rule 404(b), Ariz. R. Evid. However, the testimony was intrinsic evidence, and Rule 404(b) does not apply to intrinsic evidence. *See State v. Nordstrom*,

[4]Because Martinez did not object to the testimony on the ground of prejudice at trial, we do not address the argument on appeal. *See* Ariz. R. Evid. 103(a) ("Error may not be predicated upon a ruling which admits or excludes evidence unless . . . a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context . . . ."); *see also State v. Montano*, 204 Ariz. 413, ¶ 58, 65 P.3d 61, 73 (2003) (error waived unless predicated on grounds objected to at trial).

200 Ariz. 229, ¶ 56, 25 P.3d 717, 736 (2001) ("[I]ntrinsic evidence is admissible absent Rule 404(b) analysis."). "'Other act' evidence is 'intrinsic' when evidence of the other act and evidence of the crime charged are 'inextricably intertwined' or both acts are part of a 'single criminal episode' or the other acts were 'necessary preliminaries' to the crime charged." *State v. Dickens*, 187 Ariz. 1, 19 n.7, 926 P.2d 468, 486 n.7 (1996), *quoting United States v. Coleman*, 78 F.3d 154, 156 (5th Cir. 1996); *see also Nordstrom*, 200 Ariz. 229, ¶ 56, 25 P.3d at 736 (same). Evidence is also intrinsic when necessary "'to prove the complete story of the crime.'" *State v. Herrera*, 226 Ariz. 59, ¶ 15, 243 P.3d 1041, 1046 (App. 2010), *quoting State v. Collins*, 111 Ariz. 303, 305, 528 P.2d 829, 831 (1974). Evidence of an initial deposit into the Compass account, which quickly was overdrawn and never regained a positive balance, is intrinsic evidence of Martinez's scheme to defraud the credit union. It shows the "complete story" of how Martinez defrauded the credit union by opening and funding an account by depositing checks from an account at Compass Bank he knew did not contain assets adequate to fund those checks. *See Herrera*, 226 Ariz. 59, ¶ 15, 243 P.3d at 1046.

**¶12** In any event, even assuming Rule 404(b) applies, the evidence was admitted properly. Rule 404(b) provides that "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith" but may be admitted to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." We agree with the trial court that the evidence was admitted for a proper purpose under Rule 404(b)—to demonstrate

Martinez's knowledge and intent to overdraw the Compass account to fund the new credit union account. *See State v. Van Adams*, 194 Ariz. 408, ¶ 20, 984 P.2d 16, 23 (1999) (evidence of other acts admissible if relevant and admitted for proper purpose, including proof of knowledge and intent). Additionally, the court gave a proper limiting instruction, telling the jury it could consider the evidence only if it found the state had proved by clear and convincing evidence Martinez had committed the act, and could only consider the evidence for one of the proper purposes listed in Rule 404(b), and not as character evidence. *See State v. Terrazas*, 189 Ariz. 580, 583, 944 P.2d 1194, 1197 (1997) (protective provisions in rules of evidence include providing limiting instruction). Therefore, we conclude the court did not abuse its discretion in admitting the testimony.

**Evidence of Prior Convictions**

**¶13** Martinez also argues the trial court erred in admitting the testimony of the director of the bad check program at his priors trial as evidence of one of his two prior felony convictions. Martinez concedes the director's testimony was proper as to one of the prior felony convictions because the witness was present at that trial and was able to testify Martinez had been convicted. Martinez asserts as to the other prior felony conviction, however, the director's testimony was hearsay and without a proper foundation because he had no connection with that case. He asks this court to vacate the court's finding of that prior felony conviction and remand for a new priors trial. "We will not disturb a trial court's determination on the admissibility and relevance of

evidence absent an abuse of discretion." *State v. Jeffrey*, 203 Ariz. 111, ¶ 13, 50 P.3d 861, 864 (App. 2002).

**¶14** Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ariz. R. Evid. 801(c). "Hearsay is not admissible except as provided by applicable constitutional provisions, statutes, or rules." Ariz. R. Evid. 802. To be admissible, the out-of-court statement must fit within one of the exceptions to the hearsay rule. *State v. Tucker*, 205 Ariz. 157, ¶ 41, 68 P.3d 110, 118 (2003). One such exception includes records and reports of public offices and agencies. Ariz. R. Evid. 803(8).

**¶15** To use a prior conviction to aggravate or enhance a sentence, the state must prove the prior conviction actually occurred and the defendant is the person who was convicted. *Van Adams*, 194 Ariz. 408, ¶ 36, 984 P.2d 16, at 27. The state can use extrinsic evidence to make that showing, including "'a certified copy of a judgment of conviction,'" *id.*, *quoting State v. Nash*, 143 Ariz. 392, 403, 694 P.2d 222, 233 (1985), or a certified copy of a "pen pack" from the Department of Corrections, *see State v. Robles*, 213 Ariz. 268, ¶ 17, 141 P.3d 748, 753 (App. 2006).

**¶16** The trial court admitted into evidence both a certified copy of Martinez's "pen pack" from the Arizona Department of Corrections and certified copies of the prior convictions. Martinez does not dispute that such records are public records and therefore not hearsay. *See* Ariz. R. Evid. 803(8) (public records exceptions to hearsay rule and admissible); *see also State v. Gillies*, 142 Ariz. 564, 572, 691 P.2d 655, 663 (1984)

(prison documents public records for admissibility purposes). Regarding the prior conviction at issue, the director of the bad check program did not testify to any information that was not contained in the certified documents admitted into evidence. The director's testimony, therefore, was not an out-of-court statement and was not hearsay. *See* Ariz. R. Evid. 801(c) (out-of-court statement offered for its truth constitutes hearsay). Moreover, any error was harmless because the court could have based its finding of a prior conviction solely on the certified documents before it. *See Van Adams*, 194 Ariz. 408, ¶ 36, 984 P.2d at 27 (state can use certified copy of judgment of conviction to prove prior conviction); *see also Robles*, 213 Ariz. 268, ¶ 17, 141 P.3d at 753 (certified copy of "pen pack" sufficient to establish conviction). Therefore, the court did not abuse its discretion in admitting the testimony.

**Disposition**

**¶17** For the reasons stated, we affirm Martinez's conviction and sentence for fraudulent scheme and artifice.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge